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VELLASAMY vs. REX.

[Appellate Criminal Jurisdiction (McElwaine, C.J.), August 9, 1941]

Criminal Procedure Code, s. 2, s. 31, sub-s. 1 (d), s. 121, sub-s. 1, s. 123 and s. 124—Minor Offences Ordinance, s. 34, sub-s. 1—Admissibility of statements made to the Police—Power of Police to investigate.

The appellant was convicted under s. 34, sub-s. 1 of the Minor Offences Ordinance on a charge of being in possession of a fountain pen of the value of $5 reasonably suspected of being stolen or fraudulently obtained. On appeal, the conviction was quashed as it was found that there was no ground for suspicion against the accused. The question arose whether certain statements made by the accused to the Police were admissible.

Held, (1) that whether a statement made to the Police by a person accused under s. 34, sub-s. 1 of the Minor Offences Ordinance was admissible depended on (a) whether or not the admission was a confession and (b) whether or not the admission was made in the course of a police investigation under Chapter XIII of the Criminal Procedure Code;

(2) that if the accused was not under arrest at the time when he made the statement and if the statement was not made in the course of an investigation under Chapter XIII of the Criminal Procedure Code and if the statement was not a confession, the statement made by the accused in answer to the detective's or constable's question was admissible in evidence;

(3) that the offence with which the accused was charged was one for which the Police may ordinarily arrest without warrant and the offence was a seizable one.

Cases referred to:—

(1) *Teh Peng Kim v. Rex* (1937) M.L.J. 173; (1937) S.S.L.R. 139.

(2) *Gurunathan Chettiar v. P.P.* (1939) M.L.J. 229.

(3) *Munusamy v. P.P.* (1937) M.L.J. 93; (1936) F.M.S.L.R. 194.

(4) *Ali bin Yusof v. P.P.* (1940) M.L.J. 276.

(5) *Gorman v. Barnard* (1940) 2 K.B. 570.

(6) *Vellasamy v. Rex* Singapore Magistrate's Appeal No. 40 of 1941 (unreported).

(7) *Tan Hoe Seng v. P.P.* (1936) M.L.J. 272; (1936) F.M.S.L.R. 135.

(8) *Lim Chin v. P.P.* 5 F.M.S.L.R. 104.

(9) *Fong Sai Mun v. P.P.* (1931) F.M.S.L.R. 42.

(10) *Queen Empress v. Dhanjibhai Edulji* 20 Bombay 349.

(11) *P.P. v. Ramasamy* (1939) M.L.J. 163; (1939) F.M.S.L.R. 41.

(12) *Swami v. King Emperor* (1939) A.E.R. 396.

(13) *R. v. Lillyman* (1896) 2 Q.B. 167.

MAGISTRATES' APPEAL.

The appellant appeared in person.

T. D. Wallace Crown Counsel for the Crown.

The facts and arguments appear sufficiently from the judgment. At the conclusion of the hearing the Judge quashed the conviction but stated that he would give his decision in writing later.

McElwaine, C.J.—The appellant was convicted under s. 34, sub-s. 1 of the Minor Offences Ordinance on a charge of being in possession of a fountain pen of the value of $5 reasonably suspected of being stolen or fraudulently obtained.

I quashed the conviction at the hearing of the appeal, but as the learned Crown Counsel asked me to say something on the question of the admissibility of statements made to the Police in connection with charges under this section I said I would give my decision in writing at a later date.

The appellant was not represented before me and there was very little argument. There was no allegation that the charge was bad for duplicity, so I pass it by with a reference to *Teh Peng Kim v. Rex*[1] and to *Gurunathan Chettiar v. P. P.*[2] in which, as I understand his judgment, Murray-Aynsley, J. considered that there is no duplicity in a charge framed like the present.

There was no evidence that this fountain pen was stolen; nor was there evidence that the accused was unlikely to own such a pen. The prosecution evidence was that of a detective police constable who said "I saw the accused entering the pawnshop—he offered a fountain pen for sale—that is this pen, Exhibit P2—I interfered and questioned the accused—his answers were not satisfactory—I arrested him—I suspected this of being stolen—I arrested you on suspicion."

I entirely agree with Murray-Aynsley J. in *Gurunathan Chettiar's* case[2] that "in the case of an article in common use possession is not a suspicious circumstance when there is no evidence that the article possessed is the one stolen." The learned Judge was speaking of an article of no great value.

In the present case the learned Magistrate said that the accused is a self-confessed bad character. That is true. The appellant in giving evidence in

chief said "I admit five previous convictions—I don't know why the Police shadow me everywhere—under such circumstances how could I commit theft?"

I think this evidence discloses the real ground of suspicion, and I agree with Terrell, Ag. C.J., F.M.S. when he says in *Munusamy v. P. P.*[3] that knowledge that the accused has previous convictions should not raise in the police mind the presumption that any property found on the accused must have been stolen. See too *Ali bin Yusof v. P. P.*[4].

It is for the Court to be satisfied that there was reasonable ground for suspicion and the Court has not before it at that stage any record of the accused's antecedents. Indeed the mere preferring of a charge under this section where the article is of small value is almost tantamount to informing the Court that the accused is a bad character.

The accused gave an explanation of his possession; it may or may not be true, but it certainly was not so improbable as to be described as unreasonable, and it appears to me at least as reasonable as the grounds for suspicion. I am not impressed by the fact that the accused did not know the address of Omar from whom he said he got the pen, nor by the fact that in this city of mixed races he did not know whether Omar is a Malay or an Arab.

The section is a very drastic one and the Court should treat the accused's explanation at least as tenderly as it treats the police grounds for—not suspicion but—reasonable suspicion. Even a thief may legitimately own property.

I turn now to the point upon which Mr. Wallace asked me to express an opinion. No authorities were referred to before me except *Munusamy's* case and the definition of seizable and non-seizable offences in s. 2 of the Criminal Procedure Code. These definitions were referred to as indicating that offences against s. 34, sub-s. 1 of the Minor Offences Ordinance are not seizable offences and that therefore there can be no investigation under Chapter XIII of the Criminal Procedure Code in the absence of an order of the Public Prosecutor, and that consequently s. 124, sub-s. 1 of that Code cannot be invoked to exclude whatever explanation the accused may have given to the policeman.

Seizable and non-seizable offences are defined as offences for which the police may and may not "ordinarily arrest without warrant according to the third column, Schedule A", and in the part of that schedule dealing with offences against laws other than the Penal Code it is stated that if the offence charged is punishable with imprisonment for less than three years (as are offences under s. 34, sub-s. 1 of the Minor Offences Ordinance) the police shall not arrest without warrant.

But the definition and schedule are not the governing factor if the law otherwise states that the police may ordinarily arrest without warrant, and the police may ordinarily arrest without warrant a person reasonably suspected under the above mentioned s. 34, sub-s. 1.

I doubt if the arrest can be made under s. 38, sub-s. 1 of the Minor Offences Ordinance for reasons similar to those on which *Gorman v. Barnard*[5] was decided, but express power is given to arrest for this very offence by s. 31, sub-s. 1 (d) of the Criminal Procedure Code.

In my opinion the offence with which the accused was charged is one for which the police may ordinarily arrest without warrant and the offence is a seizable one.

What the accused's explanation to the police was, was not given in evidence, perhaps because of a recent unreported decision of my own in *Vellasamy v. Rex*[6] in which I said "certain statements by the accused to the police were given in evidence contrary to s. 124 of the Criminal Procedure Code." In that case the accused made the statements referred to after his arrest, while in the present case he made them before his arrest.

In either case if they were made during a police investigation under Chapter XIII of the Criminal Procedure Code I think they were inadmissible.

In *Tan Hoe Seng v. P.P.*[7] Aitken, J. held, as I understand his judgment, that any explanation given to the police by a person charged for this minor offence may be given in evidence. Probably the learned Judge did not intend to include an explanation which was a confession because such an explanation given to a police constable would be excluded by ss. 25 and 26 of the Evidence Ordinance. The prevailing opinion appears to be that "accused of any offence" in s. 25 applies whether the confession preceded or followed the accusation; *Lim Chin v. P.P.*[8] (a Court of Appeal decision), *Fong Sai Mun and others v. P.P.*[9]; and I think these decisions receive support from Mr. *Amir Ali's* notes on s. 25 of the Indian Evidence Act. Those decisions of the F.M.S. Courts are perhaps not technically binding upon me, and I reserve the right to reconsider them should they come before me sitting in a full Court of the Colony, but sitting as I am as a single Judge, I shall follow them, remarking that the words "made at any time by a person accused" in the definition of confession in s. 17, sub-s. 2 tend to confirm the prevailing opinion to which I have referred.

In re Tan Hoe Seng's case it appears that the accused gave an explanation which was not a confession before he was arrested but the police appear, as the learned Judge says, to have been acting on information received. In considering Aitken, J's. judgment I shall refer to the sections of the Colony law which are to all intents and purposes the same as the sections of the F.M.S. enactments upon which Aitken, J's. judgment was founded.

The second ground of appeal in *Tan Hoe Seng's* case was that the explanation should have been excluded under s. 124 of the Criminal Procedure Code.

This contention the learned Judge rejected on two grounds (a) there was no police investigation made in accordance with Chapter XIII of the Criminal Procedure Code, and (b) even if there was, the provisions of s. 124 were plainly at variance with the provision of s. 34, sub-s. 1 of the Minor Offences Ordinance and could not be allowed to prevail over the latter for two reasons (1) because if the accused's explanation could not be given in evidence against him, no offence under the subsection could possibly be proved, and (2) the Minor Offences Enactment was enacted later than the Criminal Procedure Code so that if there is any irreconcilable contradiction between their respective provisions those of the later Enactment must prevail.

Considering para. (b) first, I see nothing in s. 34, sub-s. 1 of the Ordinance which would allow evidence to be admitted if it is excluded by s. 124 of the Code or by s. 25 or s. 26 of the Evidence Ordinance. Whether there was an investigation of a seizable offence or not there was no obligation on the accused to make any answer at all which would tend to expose him to a criminal charge. He could quite lawfully answer that is none of your business and such an answer would be no evidence against him if admissible.

The guilt of the accused depends, not on whether the police officer thinks he has reasonable grounds to suspect, but on whether the Court considers that there are reasonable grounds to suspect that the property was stolen or fraudulently obtained; *Queen Empress v. Dhanjibhai Edulji*[10].

Of course, what I have said must not be taken as implying that in a civil action against a police officer for wrongful arrest, a statement by the plaintiff, when he was an accused person, would be inadmissible.

On the second point taken in para. (b), whatever the relative dates of the two F.M.S. Enactments may have been, s. 34, sub-s. 1 has been law in this Colony since 1856, forty-four years before the first of our Criminal Procedure Codes was passed. It was originally a section of the Police Act 1856 passed by the Indian Legislature for these Settlements when they were under the Government of India and which was in force here until repealed by the Minor Offences Ordinance of 1906.

In my opinion, whether a statement made to the police by a person accused under s. 34, sub-s. 1 is admissible depends on (1) whether or not the admission is a confession, and (2) whether or not the admission was made in the course of a police investigation under Chapter XIII of the Criminal Procedure Code. If it was a confession or if it was made in the course of such a police investigation it is inadmissible. It is unnecessary to consider what is a confession. A confession is defined by s. 17, sub-s. 2 of the Evidence Ordinance.

The question of difficulty is, when does a police investigation begin. No doubt it has begun when a police officer starts to keep the diary required by s. 129, but it may commence earlier, for example, when an arrest is made, though a statement made by an arrested person may be entirely independent of the investigation of the offence for which that person has been arrested, *P.P. v. Ramasamy*[11]. When an investigation starts must depend on the circumstances of each case.

If an offence has been committed by some person unknown, so soon as the police start enquiries they start investigating. If during such investigation (if it is made under Chapter XIII of the Criminal Procedure Code) they take a statement from a person who is not under arrest, that statement, if the offence is seizable, cannot be given in evidence against the maker of the statement if he is subsequently arrested and put on his trial even though the statement is not a confession; *Swami v. King Emperor*[12]

I shall assume that whatever statement the appellant Vellasamy made to the detective police constable before his arrest was not a confession, as I think it most probably was not. If it was not made during an investigation under Chapter XIII of the Criminal Procedure Code it was, in my opinion, admissible, and often it would be to the interest of the accused that it should be admissible. If that statement is the same as the one which he subsequently made to the Magistrate, then the weight to be attached to the latter is likely to be increased. Sect. 158 of the Evidence Ordinance calls the earlier statement corroboration of the latter. The word "corroborate" is used loosely and inaccurately, but the effect of the section is that under the Evidence Ordinance evidence may be given of consistency of statement and it extends the principles

of *Regina v. Lillyman*[13] to all witnesses in all kinds of cases.

But the fact that the earlier statement tends to help an accused is, unfortunately, no reason for overriding s. 124 of the Criminal Procedure Code which expressly excludes it if made during a police investigation under Chapter XIII of the Criminal Procedure Code whether the offence under investigation is seizable or not.

When the detective asked the accused for an explanation of his possession of the fountain pen, was he making an investigation? I have no doubt that he was and that he had suspicions that some offence may have been committed in respect of the fountain pen, though probably at the time he had no very definite idea as to whether the suspected offence was theft, receiving, dishonest misappropriation, or the offence which is concisely described as "fraudulent possession" in the marginal note to s. 34, sub-s. 1 of the Minor Offences Ordinance.

Whether the suspected offence is seizable or not there is nothing illegal in the police officer making inquiries and asking questions, though if the offence is not seizable or if in fact there is no offence, there is no power to require answer to the questions, in the absence of an order under s. 118, sub-s. 2.

In my opinion the powers of the police to investigate do not depend solely on Chapter XIII of the Criminal Procedure Code. The duties of the police force as set out in s. 30 of the Police Force Ordinance (Cap. 177) include detecting crimes, apprehending persons who have committed or who are suspected of having committed crimes and these duties are amplified in s. 31 of the Criminal Procedure Code and most of these duties imply a power to investigate whether there has been an information under s. 117 or s. 118 of the Criminal Procedure Code or not.

In the ordinary case of inquiry on suspicion the question "is the officer inquiring into a seizable or non-seizable crime?" does not depend on his state of mind or knowledge at the time he commences his inquiry but on the charge which he ultimately prefers as a result of his investigation. At that stage it is apparent that what was investigated was what appeared to be a seizable offence or a non-seizable offence. I say 'appeared to be' because the nature of the offence or there being an offence at all, does not depend on the result of the trial, but on the result of the investigation which induces the authorities to consider with what offence the person concerned should be charged.

I have already expressed the opinion that an offence under s. 34 is a seizable offence. The police officer was investigating a seizable offence, but I agree with Aitken, J. that the investigation was not under Chapter XIII of the Criminal Procedure Code. As I understand that chapter, investigations under it must be by or under the direction of a police officer not below the rank of Inspector and there is no evidence in this case that an Inspector knew anything about the case until after the arrest. The statement made by the accused to the detective was therefore not 'made' "in the course of a police investigation made under this Chapter", and it is not excluded by s. 124.

But in *Fong Sai Mun v. P.P.*[9] Sir Lancelot Elphinstone, C.J., while considering an appeal against a conviction for a non-seizable offence in which the only evidence against the appellants was an admission of the ownership of incriminating documents made by them to a police officer, said "In this case no order of the Public Prosecutor had been obtained, and the questioning of the persons present under s. 112 (Colony s. 123) was unlawful. Nevertheless the power of questioning under s. 112 was in fact exercised, though unlawfully, and it cannot have been intended that a statement made in the course of an unlawful examination under s. 112 should be admissible, while the same statement, if the examination had been lawful, would be inadmissible."

The point of the case was that the questions were asked in the course of an investigation under what in our Code is Chapter XIII of a non-seizable offence and I respectfully agree with the learned Chief Justice that the answers given were inadmissible. I do not, however, agree that it is "unlawful" for any police officer to ask questions, though it does not follow that the answers are admissible.

Sect. 121 sub-s. 1 of the Criminal Procedure Code empowers an Inspector to depute one of his subordinate officers "to inquire into the facts and circumstances of the case and to take such measures as may be necessary for the discovery of the offender." I think this clearly implies that the constable who is to inquire may ask questions, and in asking questions he is not acting under any special power because s. 121, sub-s. 3 says that he is not entitled to exercise any of the special powers given by s. 123, but if he cannot ask questions how is he to inquire or discover the offender? No doubt the answers would be given in the course of an investigation under Chapter XIII and as such would be inadmissible in evidence, but the asking of the questions is not unlawful.

A right to ask questions and a power to compel answers under the sanction of ss. 176 and 177 of the Penal Code are two entirely different things, and s. 123 of the Criminal Procedure Code is only a special power in so far as it compels answers, and it does not compel answers to any police officer in the case of a non-seizable offence unless the sanction of the Public Prosecutor has been obtained under s. 118, sub-s. 2 or to any officer below the rank of Inspector in the case of a seizable offence.

In the present case, as there was no investigation under Chapter XIII of the Criminal Procedure Code, there is nothing expressly to exclude the answers given by the accused prior to his arrest so long as those answers do not amount to a confession, but does this fact conclude the matter? I confess to having wavered in my view and I have not had the advantage of hearing argument on the point, and I feel the force of Sir Lancelot Elphinstone's reasoning even though the facts before him were very different from the facts in the present case.

What the detective was investigating was in fact a seizable offence. If he was acting under the direction of an Inspector the answers would not have been admissible, how then can they be admissible when they were given in the course of an investigation conducted by the detective without reference to or guidance from an inspector?

On the other hand we have the general principle that statements not being confessions are admissible unless they are made to a police officer in the course of a police investigation made under Chapter XIII. If the statements were not made during such an investigation they are not expressly excluded, and if this conclusion is illogical or unreasonable it is for the legislature to delete the words "under this Chapter" in s. 124.

I follow the decision of Aitken, J. in *Tan Hoe Seng's* case and hold that if the accused was not under arrest at the time when he made the statement and if the statement was not made in the course of an investigation under Chapter XIII of the Criminal Procedure Code and if the statement was not a confession, the statement made by the accused in answer to the detective's or constable's question is admissible in evidence.

Order accordingly.

IN RE THE A. B. CLUB.

[Appeal from Assessment of War Tax (Aitken, J. (Chairman), F. M. Edmonds and R. Burns (Commissioners)) October 21, 1941]

War Tax Ordinance Ss. 2, 7, 8—meaning of "Association" and "business"—whether contributions of members of a club liable to War Tax.

The questions raised in this case were whether an unincorporated member's club was an association for the purposes of the War Tax Ordinance, whether it could be said to carry on "a business" within Section 2 of the Ordinance and whether the contributions made by the members to the club's financial resources could properly be regarded as part of its income and so liable to war tax.

Held, (1) that the club was an association within the meaning of that term as defined in Section 2 of the Ordinance, because it did undoubtedly consist of a number of persons who were associated together for the purpose of one or more common objects.

(2) that on the facts the club did carry on a business in the Colony as it provided, maintained and organised facilities for sports and also conducted an extensive catering business.

(3) that contributions made by its own members to a club's financial resources could not properly be regarded as part of its income and that they were not liable to war tax.

K. E. W. Hatchard for the A. B. Club.

E. Tongue (Collector-General) in person.

The judgment of the Board of Commissioners was as follows:—

The A. B. Club is a well known club at Singapore which not only provides enviable sporting and social facilities for its members, who now number over 1,000, but also the advantages of food and liquid refreshment on convenient premises and the amenities of a hairdressing saloon.

In constitution it is an unincorporated member's club, that is, an association of persons each of whom contributes to the funds out of which the very considerable expenses of conducting the Club are paid. It is not recognised as having any legal existence apart from the members of which it is composed except, perhaps, for the purposes of the War Tax Ordinance; and that is one of the questions which we have to decide.

There are several classes of members, and though all of them except, perhaps, Honorary Members, contribute in some way or other to the Club funds, it seems to us that the property and funds of the Club probably belong to the Ordinary and Life Members, who are the only members entitled to take an active part in the management of the Club. It is only upon